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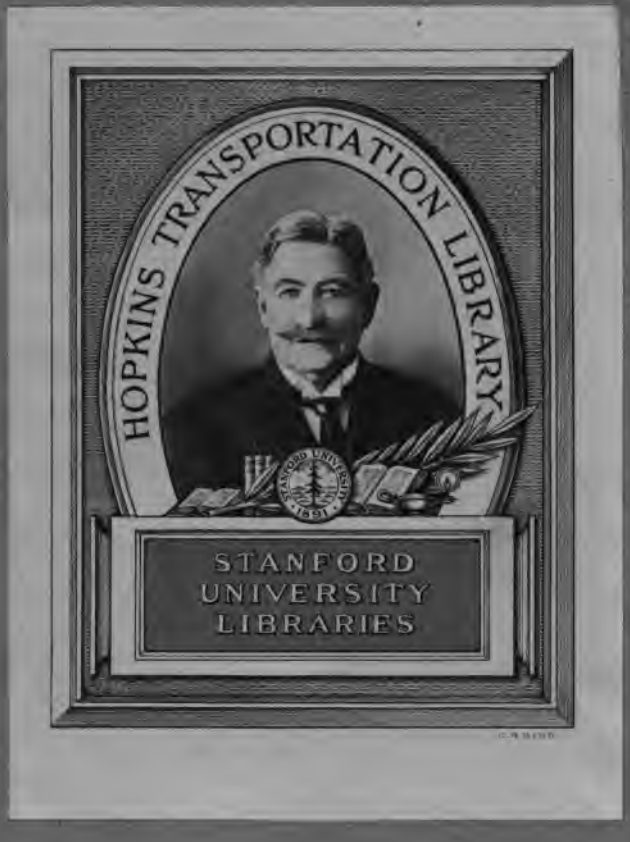
or
Commission?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# GOVERNMENT BY LAW OR BY COMMISSION?

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SHALL THE DISCRETIONARY POWER TO REGULATE COMMERCE BE CONFERRED UPON AN ADMINISTRATIVE BOARD OR BUREAU OF THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT?

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A PARAMOUNT POLITICAL ISSUE NOT DISCUSSED DURING THE LATE PRESIDENTIAL CAMPAIGN



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BY JOSEPH NIMMO, JR., LL.D.

NOVEMBER, 1908

# GOVERNMENT BY LAW OR BY COMMISSION?

During the first session of the Sixtieth Congress President Roosevelt communicated to Congress four messages in which he advocated the governmental administrative supervision and control of the physical and financial interests of the railroads of the United States. The President clearly indicated that it was his desire to confer this power upon the Interstate Commerce Commission. In his special message to Congress of March 25, 1908, the President recommended the passage of H. R. 19745, commonly known as "The Civic Federation Bill," the object of which was to establish the policy to which he had become devoted. This bill was referred to the Committees on the Judiciary of the Senate and of the House of Representatives, but was never reported upon by either of those committees, and apparently for the reason that both branches of Congress were opposed to the policy so strenuously advocated by the President. The reason for this opposition in Congress to the policy of administrative supervision and control of the physical and financial interests of the railroads appears to have been based upon the well-known history of the results of that policy. About six months after the passage of the act of June 29, 1906—the first step taken in the direction of enforcing the President's policy—there was a decline in the market value of railroad and other securities amounting to the enormous sum of five thousand million dollars. This exceeded the cost of the Civil War. Only eight months later there occurred the disastrous financial crisis of October, 1907, from the direful commercial and financial results of which the country has not yet

recovered. The example set by the national Government in the attempt at administrative supervision and control of the physical and financial interests of the railroads was imitated in certain of the States with results quite as destructive. The effects of the policy advocated by the President afforded a striking illustration of the French maxim: "The cause of the cause is the cause of the thing caused."

A realizing sense of this truth appears to have led the Senate and House of Representatives of the United States in Congress assembled to reject the appeals of the President in favor of the policy of administrative supervision and control of the physical and financial interests of the railroads.

Nevertheless the President, by his phenomenal political influence, was able to incorporate his policy into the platform of the Republican party. The Democratic party having adopted a similar policy in its platform, the question as to administrative supervision and control of the physical and financial interests of the railroads was not debated during the late presidential campaign which has resulted in the election of Judge William H. Taft. That question now comes up as unfinished business before both branches of Congress. My knowledge of the general trend of opinion among Senators and Members of Congress during the last twenty-five years, and particularly during the first session of the Sixtieth Congress, leads me to the confident belief that at its next session beginning December 7, 1908, both the Senate and House of Representatives will adhere to their former conclusion that the governmental administrative supervision and control of the railroads of the United States is anti-American and prejudicial to the prosperity and welfare of the country. This is the undoubted opinion of the Federal judiciary, as indicated in my pamphlet of February 8, 1908, entitled "Judicial and Administrative Supervision and Control of Railway Affairs," and clearly enunciated by Mr. Justice Brewer as follows:

> "Legislation may be turning everything over to commissions, but the courts have not yet been heard from."

In the same connection he added:

> "When the matter of legislation by commission gets to the courts they will be found upholding the Constitution with the same fidelity in which it has been held since the days of John Marshall."

It is inconceivable that the eminent lawyer and jurist who has just been elected President of the United States will refuse to place himself in the line of the judicial view as thus indicated, especially as the policy of the administrative supervision and control of the railroads by a commission was not debated during the late presidential campaign, and is apparently a question beyond the control of the President-elect, as it is still, and hopefully will remain for all time, beyond the control of the Chief Executive of the nation.

Ours is a government by law and not by commission. Like the decalogue, its mandates are "thou shalt" and "thou shalt not." On these lines from the beginning, with few exceptions, it has governed corporations as well as individuals.

The President has clearly perceived this obstacle to his scheme of governmental administrative supervision and control of the physical and financial interests of the railroads. Accordingly, in two of his messages to Congress he has proposed amendments to the Federal Constitution in order to accomplish his purposes.

In his annual message to Congress submitted December 2, 1902, President Roosevelt suggested the possible need of a constitutional amendment "so as to secure beyond peradventure the power sought to regulate the interstate trade of the country."

Again, in his annual message to Congress on December 5, 1905, President Roosevelt said that in order to control great

corporations "such commission (the Interstate Commerce Commission) should be made unequivocally administrative," embracing the power to establish both maximum and minimum rates. In the same connection President Roosevelt stated that in his belief it might become necessary "to confer in fullest form such power upon the national Government by a proper amendment to the Constitution," *i. e.*, by an amendment to the power of Congress to regulate commerce with foreign nations and among the States.

The precise object which President Roosevelt had in view in recommending such radical amendments to the Constitution of the United States was clearly stated in a speech delivered by him at Harrisburg and at York, Pennsylvania, on October 4, 1903. On that occasion he declared "that the United States Government has and is to exercise a constantly increasing and constantly more effective supervision and control over all the work of the great common carriers of the country and over the work of all the great corporations which directly or indirectly do any interstate business."

The vital question which confronts the country at the present time is the intensely political question: Shall the commercial provisions of the Constitution of the United States be repealed by amendment, including section 9 of article 1, which declares that "no preference shall be given by any regulation of commerce to the ports of one State over those of another." Thus President Roosevelt has raised the paramount issue, which now confronts the country, and which Congress at its last session refused to act upon at his solicitous request. This question now comes before Congress as unfinished business in the form of the "Civic Federation Bill."

The subject is intensely political. It appeals to the legislative mind and to the judicial mind, and it can never be determined finally by the Chief Executive without radically changing the genius of our governmental institutions. This

fact is clearly evidenced by our legislative and judicial experiences.

The principal reasons for the dissent of the Senate and House of Representatives to the views expressed by President Roosevelt in his annual message to Congress of December, 1907, and in his special messages of January 31, March 25, and April 27, 1908, in favor of his cherished policy of the governmental administrative supervision and control of the physical and financial interests of the railroads, are stated in the supplement to this paper at pages 15 to 23, inclusive, as follows:

1. THE ASSUMPTION OF A DISPENSING POWER.—The President's policy, which involves conferring dispensing power upon one or more administrative offices of the executive branch of the Government, was assumed to be unconstitutional by Senator Nelson, chairman of the sub-committee of the Committee on the Judiciary of the Senate. The authority of any commission to exercise such power was emphatically denied by Judge Thomas M. Cooley, the eminent jurist who was appointed first chairman of the Interstate Commerce Commission (see pages 15 and 16). And yet at this late day it is proposed to endow one or more branches of the Executive Department—and notably the Commissioner of Corporations and the Interstate Commerce Commission—with dispensing powers of various sorts.

A case was decided by the Supreme Court on March 23, 1908 (No. 73, October term, 1907), in which the Court rendered a unanimous decision sustaining the refusal of a circuit court to enforce an order of the Interstate Commerce Commission. In this opinion rendered March 23, 1908, the Supreme Court said:

> "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for

securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager."

2. THE PRESIDENT'S POLICY INVOLVES BUREAUCRATIC GOVERNMENT.—This was clearly stated at the hearings, and apparently commanded the approval of Senator Nelson, chairman of the Senate committee.

3. The President's policy involves administrative procedure in the nature of espionage. Page 17.

4. The assumed right of the Commissioner of Corporations to enter an order declaring that "in his judgment" a contract or combination in reasonable or unreasonable restraint of trade has the appearance of a judicial finding by an officer of the administrative Government who has no judicial authority whatsoever. Page 17.

5. The Civic Federation Bill involves an unwarranted assumption of judicial authority by the Commissioner of Corporations and the Interstate Commerce Commission, as stated in my reply to the argument by Hon. Herbert Knox Smith, Commissioner of Labor. Pages 19 to 23.

There is no question about the propriety and necessity of regulating the railroads. The only practical question involved relates to the proposition to have recourse to unconstitutional measures for effecting such regulation. That is clearly involved in the proposition to amend the Constitution in such way as to confer upon an administrative board the function which the Constitution confers upon the legislative and the judicial branches of the Government of the United States.

It is inconceivable that the distinguished jurist who has just been elected President of the United States should fail to perceive the fallacy of this proposition.

Both affirmative and negative laws regulating the railroads, which clearly recognize the public character of the railroads and their proper relations to the commercial, in-

dustrial, and social conditions of the people, have stood upon the statute books of the various States and of the nation from the beginning. The results of those statutory provisions have been most salutary and beneficent. Especially has this characterized the Interstate Commerce Act of February 4, 1887. This is stated on pages 5 and 6 of the supplement to this paper. But those statutory regulations have fallen far short of providing that the Government shall by constitutional amendment authorize an administrative board to supervise and control the physical and financial interests of the railroads of this vast country.

It is a fact settled beyond all question, and for all time, that the railroads of this country are fully entitled to that institutional freedom which the Constitution of the United States secures to every man and to every association of men.

It is high time that the attempted policy of remitting commercial problems of vast magnitude and importance to the discretion of commissions shall be suppressed and that the legislative and judicial functions of Government shall be maintained in their integrity as established by the Constitution.

There is no radical difference in principle between governmental ownership of the railroads and governmental regulation of the discretionary sort by a commission exercising administrative authority. The exigent demand of the hour is for government by law and not by commission.

The asserted principle of the governmental administrative supervision and control of the physical and financial interests of the railroads involves important commercial considerations and important economic considerations, but it involves much more important political considerations. The country knows and President Roosevelt has frankly admitted that the policy which he advocates involves a fundamental change in the Constitution of the United States. It also involves a radical departure from the great American principle of liberty regulated by law. As such it constitutes a strenuous appeal to the

legislative wisdom and patriotism. This has been clearly stated by Chief Justice Marshall in defining the limitations under which legislative powers may be exercised by but not delegated to the Executive authority. On these lines liberty regulated by law has its finest expression.

PREDATORY WEALTH.—We have heard a good deal of late about predatory wealth, but no person has attempted to define it. An attempt has, however, been made to describe a possessor of predatory wealth. In his fourth message to the first session of the Sixtieth Congress urging the legalization of administrative supervision and control of the physical and financial interests of the railroads, President Roosevelt described such an one as "a man whose face has grown hard while his body has grown soft; whose son is a fool and his daughter a foreign princess" (message of April 29, 1908, page 13).

But the practical question arises: What is the difference between "predatory wealth" and beneficent wealth in their effects upon the public welfare? The law distinguishes between dishonestly gotten and honestly gotten wealth. If the law fails in that regard it is a matter for statutory adjustment and not for constitutional amendment. All wealth not condemned by the law imposes the responsibility of its use in such manner as to afford employment to labor and conduces to the general prosperity of the nation. For years I have struggled with the economic problem as to which class of capitalists conduce most to the general prosperity—the multi-millionaires or the moderately rich, possessed of a few thousand or a few hundred thousand dollars. I am inclined to think that the general public welfare, with respect to great undertakings, is most promoted by those who handle millions with the responsibility of investing it in productive enterprise involving the employment of hundreds or thousands of operatives engaged in moving commerce or in conducting great industrial operations. This is a problem of

the ages, and I do not believe that any person living has the knowledge requisite to decide it as a politico-economic question.

THE RELATIVE MAGNITUDE AND EFFICIENCY OF THE AMERICAN RAILROAD SYSTEM.—The American railroad system is the grandest, the cheapest in point of transportation charges, and the most efficient system of transportation on the globe. The railroad mileage of the United States at the present time is about 230,000 miles. That of the railroads of the continent of Europe is 196,410. The average charge for transportation of freight in Europe is about 70 per cent. greater than in the United States. The average passenger fares in Europe are also considerably in excess of passenger fares in the United States. At the same time the wages of railroad employees in the countries of Europe is much less than in the United States. In a recent address Mr. William C. Brown, senior vice-president of the New York Central Lines, stated by way of illustration that "the engineer who pulls the train from London to Liverpool is paid $2.00, while the man who runs the train from Boston to Albany, about the same distance, receives $7.60."

INCOME FROM RAILROAD SECURITIES.—The average interest on railroad bonds during the year 1905 was 3.64 per cent. and the average dividends on railroad stock was 3.27 per cent. as stated by the Bureau of Statistics of the Department of Commerce and Labor.

I am informed that the Department of Agriculture has made no estimate of net income of farmers, nor has the Census Bureau attempted to make any statement of net income of manufacturers. The reasonableness of the average receipts of railroad companies can only be conjectured from the increase of the national wealth, the increased value of farms and farm property, the increased value of products of manufacture and other census values. The following data

of this sort is deduced from increased valuations in the year 1905 as compared with those for the year 1880:

| | Increased valuations. |
|---|---|
| National wealth | $63,462,000,000 |
| Farms and farm property | 15,820,000,000 |
| Products of manufacture | 9,432,000,000 |
| Railroad capital | 8,863,000,000 |

Surely there is no economic excuse for the proposition to confer upon any administrative branch of the Government the authority to supervise and control the physical and financial interests of the railroads.

JOSEPH NIMMO, JR.

WASHINGTON, D. C.,
*November* 14, 1908.

# GOVERNMENT BY LAW OR BY COMMISSION?

## SHALL THE DISCRETIONARY POWER TO REGULATE COMMERCE BE CONFERRED UPON AN ADMINISTRATIVE BOARD OR BUREAU OF THE EXECUTIVE DEPARTMENT OF THE GOVERNMENT?

At no previous period in the history of interstate commerce have radical policies of governmental regulation of the railroads in this country been so assertive as at the present time. The expression *radical policies of regulation* is a manifest euphemism. Radical policies so-called involve anti-American or destructive methods of regulation dictated by a commission or other administrative authority which contravenes the original conception of liberty regulated by law. Rather it is autocratic rule regulated by the discretion and individual judgment of administrative officers without judicial authority. The conservative policy of railroad regulation on the other hand is true to the fundamental principles of the common law and American ideas enunciated in the Constitution of the United States. The expression, radical and conservative policies, has had its origin in the parlance of current political debate.

It will be an object of this paper to prove the correctness of these assertions.

Radical ideas in regard to railroad regulation have prevailed in this country, to some extent, during the last thirty-five years, both as to interstate commerce and intrastate commerce. Such ideas have been entertained and vigorously expressed by Republican and by Democratic politicians. During the last five years radical ideas have gained an ascendency in the western and northwestern States and in the

southern States, the result of which has been expressed in legislation hostile to railroad interests. This paper favoring the conservative policy of regulation may be regarded—as it is intended to be—strictly as a non-partisan presentation of the subject.

## The Genesis and Growth of Governmental Regulation of the Railroads.

The present time appears to be opportune for certain observations upon the history of governmental regulations of the railroads. Such regulations have been proved by the lessons of experience to be necessary for the maintenance of the orderly conduct of the railroads of this country. The necessity for such regulations was involved in the creation of the American Railroad System by the Act of June 15, 1866, which reads as follows:

> **"That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination."**
>
> **R. S., Sec. 5258.**

Experience soon proved that agreements as to the rates which shall be maintained by coterminous as well as by competing railroads are one of the necessities of railroad regulation, and that such regulations shall have their sanction in positive provisions of law.

As an officer of the Government charged with the duty of investigating and reporting upon the internal commerce of the United States, I earnestly recommended the adoption of such regulations and have not ceased to commend the act to regulate commerce of February 4, 1887, which provides for reasonable rates not unjustly discriminatory with respect to persons, places or commodities. This act, in connection with the Elkins Act of February 19, 1903, forbidding rebates has proved to be an almost ideal mode of regulation. In reply to a resolution of the Senate, on May 1, 1905, the Interstate Commerce Commission reported the results of its work for the then preceding eighteen years as follows:

| | Number in eighteen years. |
|---|---|
| Total number of complaints heard by the Commission | 9,099 |
| Total number of complaints disposed of through the mediatorial offices of the Commission | 9,054 |
| Number of cases appealed to the courts | 45 |
| Number of cases sustained by the courts | 8 |
| Number of cases of unjust discrimination and other offenses sustained by the courts | 8 |
| Number of cases of exorbitant rates sustained by the Courts | None. |

From private sources of information it appears that the total number of freight transactions on the railroads of the United States during the eighteen years covered by the above data amounted to approximately three thousand millions (3,000,000,000.)

The chairman of the Interstate Commerce Commission several years ago reported to the Senate Committee on Interstate Commerce that exorbitant rates in this country is practically an obsolete question. He is also reported to have said on June 16, 1907: "For the first time in the history of American railways, secret preferences and advantages have practically disappeared." This was a result of the Elkins

Act of February 19, 1903, an act which was drawn by Senators who adhere to conservative views of railroad regulation. The fact that three thousand million freight transactions (3,000,000,000) involved only 9,099 complaints to the Commission, or only one in about 330,000, during a period of eighteen years, of which complaints only 45 cases of all sorts were appealed to the courts, of which the courts sustained only eight cases; and that not a single case of exorbitant rates was proved in the courts indicates that the Commission has been a marked success and a most valuable adjunct of the Federal judiciary. Such beneficent results have preceded from conservative regulations, or regulation based upon the principle of government by law administered or supervised by judicial tribunals, and not the result of the supervision and control of the railroads by administrative officers charged with the impossible function of directing railroad officers how to manage the properties or to protect the financial interests committed to their care. We need more regulation by the specific provisions of law, and less regulation in the nature of administration and control. The former is conformed to the true principle of Americanism. The latter is essentially anti-American.

Prior to the act of June 29, 1906, the interstate commerce law of the country was conservative. It provided that the findings of the Commission "shall in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found." It avoided any radical provision and was strictly an administrative statute. By its avoidance of the necessity for judicial procedure in the great majority of cases it suggested the legal adage *de minimis non curat lex.* This was evident from the fact that of the 9,099 complaints heard by the Commission during the first eighteen years of its existence only 45 cases were appealed to the courts, of which only 8 cases were sustained by the courts, none of which cases involved a single case of exorbitant rates in the entire United States, while "secret preferences and advantages had practically disappeared."

But in the face of these important and incontrovertible facts proving the efficiency and absolute sufficiency of the Interstate Commerce act, as amended, there has sprung up a demand that the Interstate Commerce Commission shall be endowed with administrative powers of supervision and control of railway affairs which transcend the powers granted to the national Government by the Constitution of the United States.

The movement in favor of the assumption of such powers had its origin in the action taken by the Interstate Commerce Commission. Within two years after the Commission was organized it assumed that it was endowed with a certain degree of judicial power. This was promptly denied by the Federal judiciary, with the explanation that the only relation of the Commission to judicial power was that its findings of fact should be deemed to be *prima facie* evidence as to each and every fact found.

Soon after the Commission assumed that it was by evident implication of law endowed with the power to prescribe rates for the future. In the so-called Maximum Rate Case (167 U. S., 479) the Supreme Court decided that the Commission is not authorized to prescribe maximum rates, minimum rates, or absolute rates.

In the face of this second judicial repulse the Commission in its subsequent annual reports has recommended that it be endowed by law with the power to prescribe rates, fares, charges, classifications, privileges, and facilities, and to issue administrative orders, an undoubted judicial function. These constitute some of the essential features of radical railroad regulation advocated today.

The Interstate Commerce Commission has placed upon record its own ideas as to the proper nature and scope of its powers. In an argument addressed to the Senate Committee on Interstate Commerce on March 16, 1892, the Commission made the following astounding declaration:

> "The commercial development of the country has outgrown the capacity of the common law and the

> ordinary judicial tribunals to adapt themselves, under certain circumstances, to the complete and effective administration of justice."

In its annual report for the year 1893 the Commission declared at pages 10 and 11 that it ought to be invested not only with the power to determine rates, but also with the power to determine the relative commercial status of the various towns, cities, sections and industries of this vast country. This was expressed as follows:

> "To give each community the rightful benefit of location, to keep different commodities on an equal footing so that each shall circulate freely and in natural volume, and to prescribe schedule rates which shall be reasonably just to both shipper and carrier is a task of vast magnitude and importance. In the performance of the task lies the great and permanent work of public regulation."

At page 59 of its ninth annual report, submitted December 2, 1895, the Commission said:

> "The guardianship of the public interest so far as interstate commerce is concerned is, under existing law, intrusted to this Commission * * * to some extent every question of transportation involves moral and social consideration, so that a just rate cannot be determined independently of the theory of social progress. This argument is perhaps as indefinite as it is comprehensive."

It seems to go without saying that these ideas express the most fantastic idealism. No legislative or administrative authority can ever be entrusted with the power to determine the course of the commercial or industrial development of this country. Nevertheless these ideas constitute the basis of the present popular policy of radical railroad regulation under the title of "Administrative supervision and control of the railroads."

## The Attitude of President Roosevelt Toward the Assumptions of the Interstate Commerce Commission.

Soon after his accession to the presidency, upon the death of President McKinley, President Roosevelt exhibited marked favor toward the assumptions of the Interstate Commerce Commission in favor of its being endowed with radical powers of railroad regulation.

In his annual message to Congress submitted December 2, 1902, President Roosevelt suggested the possible need of a constitutional amendment "so as to secure beyond peradventure the power sought to regulate the interstate trade of the country."

Again in his annual message to Congress on December 5, 1905, President Roosevelt said that in order to control great corporations "such Commission (the Interstate Commerce Commission) should be made unequivocally administrative," embracing the power to establish both maximum and minimum rates. In the same connection President Roosevelt stated that in his belief it might become necessary "to confer in fullest form such power upon the national Government by a proper amendment to the Constitution," *i. e.*, by an amendment to the power of Congress to regulate commerce with foreign nations and among the States.

The Constitution of the United States as it came from the hands of its framers was the raw product of statesmanship unsurpassed in the political annals of the globe, but today the Constitution has become the ripe fruit of the legislative, judicial, administrative and commercial experiences of the foremost nation on the globe through the tempestuous political struggles of one hundred and nineteen years, and it is the common belief that no farther amendment to the Constitution as to the powers granted will be adopted except as the result of war which will shake our fabric of government to its foundations.

President Roosevelt strenuously adheres to the idea that the railroads of the United States must be regulated by some administrative office of the executive branch of the Government. In a speech delivered at Harrisburg, Pennsylvania, on October 4, 1906, he declared **"that the United States Government has and is to exercise a constantly increasing and constantly more effective supervision and control over all the work of the great common carriers of the country and over the work of all the great corporations which directly or indirectly do any interstate business."**

Similar views were expressed by the President in his last annual message to Congress, and in his special messages of January 31, March 25, and April 27, 1908.

By virtue of his exalted position, his extraordinary personal influence, and his strenuous advocacy of the scheme of placing the railroads of the United States under the administrative supervision and control of the Interstate Commerce Commission, President Roosevelt may be regarded as the chief exponent of the radical policy of railroad regulation in this country.

CERTAIN FEATURES OF THE RADICAL POLICY OF RAILROAD REGULATION—THE PROPOSED AMENDMENT OF THE ANTITRUST ACT OF JULY 2, 1890.

During the first session of the Sixtieth Congress President Roosevelt enunciated certain features of his policy for the radical regulation of the railroads. In a special message to Congress on January 31, 1908, he advised that "the Interstate Commerce Commission should be empowered to pass upon any rate or practice on its own initiative," and to have the authority to issue an order "prohibiting an advanced rate pending examination by the Commission." He also recommended that the Commission should be empow-

ered to make a physical valuation of any road, and that it should be authorized to "exercise supervision over the financial operations of our interstate railroads." In the same connection President Roosevelt recommended that the Commission should "assume a certain measure of control over the physical operation of railways in the handling of interstate traffic," and "have authority in particular instances to determine the conditions upon which cars shall be interchanged between different interstate railroads," and that "the rates, regulations and practices upon which they agree should be subject to disapproval by the Commission."

It is not my purpose in this connection to comment further upon the expedients of radical regulation further than to say that there is no essential difference between the governmental ownership and operation of the railroads, and governmental supervision and control of rates, accounts and business operations as thus defined. Both are in the nature of governmental participation in the general field of economic endeavor, and as such in the nature of State socialism, which is the inversion of the principles of commercial liberty whence all our commercial and industrial life has proceeded from the beginning.

## The Proposed Amendment of the Anti-trust or "Sherman Act" of July 8, 1908.

The Supreme Court of the United States decided on March 22, 1897, in the Trans-Missouri Case that the anti-trust or Sherman Act prohibited *every contract or combination in restraint of trade whether reasonable or unreasonable.* This decision was well pleasing to the advocates of radical regulation of the railroads so long as it applied mainly to the railroads, but when the Supreme Court decided on February 3, 1908, in the case of Loew *vs.* Lawlor—the Danbury Hatters' case—that the anti-trust act of July 2, 1890, forbids boycotts by labor organizations, then the advocates of radical

railroad regulation awoke to the assumed fact that the statute of July 2, 1890, was vicious. It was then assumed that some statutory arrangement must be provided in order to hold the railroads to the restraints defined by the act of July 2, 1890, as decided in the Trans-Missouri Case of March 22, 1897, and in the Joint Traffic case of October 24, 1898, and at the same time to protect laboring men, farmers, manufacturers and merchants engaged in interstate commerce and railroad companies against the law of July 2, 1890, forbidding every contract or combination in restraint of trade or commerce. The bill devised for this purpose was confided to the care and advocacy before Congress, of the National Civic Federation of New York city. Hence it acquired the title of "The Civic Federation Bill." On March 25, 1908, President Roosevelt communicated to the two houses of Congress a special message in which he proposed to accomplish the objects of this bill, which was introduced in the House of Representatives on March 23 as H. R. 19745, and in the Senate on April 1, 1908, as Senate Bill 6440.

These bills, which were substantially similar, provided a scheme of registration in the office of the Commissioner of Corporations of the Department of Commerce and Labor for corporations and associations other than common carriers, and granted to such Commissioner the power to determine whether any contract or combination entered into by any such corporation or association is in unreasonable restraint of trade or commerce, and if not in such unreasonable restraint to grant it exemption from the provisions of the first six sections of the act of July 2, 1890. In like manner it was provided that common carriers might obtain exemption from the first six sections of the act of July 2, 1890, on application to the Interstate Commerce Commission and subject to its approval.

The vice of this arrangement consisted in the fact that it proposed to confer upon the Commissioner of Corpora-

tions—a mere head of a bureau of the Department of Commerce and Labor—the control of enormous business operations not by virtue of any rule of law or of government in its ordinary sense, but simply according to the discretion of a government officer not endowed with any judicial authority whatsoever.

This scheme involved the expedient of substituting administrative for judicial control of railway affairs contrary to the principles which have prevailed in this country from the beginning.

Grave doubts exist as to whether such a law would stand the test if it should come before the Supreme Court of the United States for determination as to its constitutionality.

The import of the special message by the President of March 25, 1908, and of the bills mentioned was described in an argument which I had the honor to make before the Judiciary Committee of the House of Representatives on April 25, 1908, and before the Senate Committee on Judiciary on April 28, 1908, and need not be repeated here. Suffice it to say in this connection that both the Senate and House of Representatives were astounded by the radical nature of the President's special message and the provisions of the bills which were submitted expressive of the views which the Administration urged upon Congress for enactment into law.

The Senate and House of Representatives took no action upon the bills thus submitted to them farther than to commit them for hearings to sub-committees of the two committees on the Judiciary, which took testimony and informally postponed the whole subject to the next session of Congress which will convene on December 7, 1908. The House Committee took 747 printed pages of testimony and the Senate Committee took 278 printed pages of testimony. This was only a beginning of the investigation of the vast subject to which the attention of Congress had been invited. Enough testimony was taken, however, in order to

indicate to both houses of Congress the vastness of the subject to which their attention had been called and the appalling political dangers which it involves.

Notwithstanding the fact that President Roosevelt in his special messages of March 25 and April 27, 1908, urged upon Congress the importance of action "before the close of its present session," both branches of Congress refused to heed his request as to the necessity for haste.

In this connection I would briefly advert to some of the vitally important political objections to the bill introduced simultaneously in the House of Representatives and in the Senate.

## Serious Political Objections Involved in the So-called "Civic Federation Bill."

### 1. The Assumption of Legislative or Judicial Functions by an Administrative Board or Bureau.

1. The extreme danger of attempting to endow an administrative board or bureau of the executive branch of the Government with legislative or judicial functions is apparent. The revolutionary character of such a proposition has been indicated by Mr. Justice Brewer, one of the most learned and distinguished of American jurists. Upon this point that great judicial authority said:

> "Legislation may be turning everything over to commissions, but the courts have not yet been heard from."

He added in the same connection:

> "When the matter of legislation by commission gets to the courts they will be found upholding the Constitution with the same fidelity in which it has been held since the days of John Marshall."

The gentlemen who are urging the adoption of radical policies of railroad regulation seem to lose sight of the fact that this is a triune Government, and that one of its constituent elements is "The Judicial Power of the United States."

2. The Assumption of a Dispensing Power.

A second dangerous political error involved in the radical policy of railroad regulation is the proposed assumption of a "dispensing power" in the hands of the Chief Magistrate of the nation. This issue was suggested during the late hearings by Senator Nelson, chairman of the sub-committee of the Committee on the Judiciary of the Senate, and is noted on page 5 of my argument before that committee.

The dispensing power of the monarch of Great Britain, which was terminated by the Declaration of Right in the year 1688, was at the same time eliminated from the governmental institutions of the English speaking people of the globe. The attempt to restore it in this country will be futile.

The assumption of a dispensing power under our governmental system was repudiated by the famous author of "Constitutional Limitations," Judge Thomas M. Cooley, first chairman of the Interstate Commerce Commission. On page 119 of the First Annual Report of the Commission that great authority on constitutional law said:

> "The Commission has not been given a general dispensing power to relieve hardships under the law, but its power in that regard is strictly and carefully limited."

And on page 124, in replying to a request for an order of that nature, the great jurist said:

> "It could not, in fact, be made a ground for relief without giving the Commission such a general dis-

pensing power as would not be consistent with sound principles of government."

And yet at this late day it is proposed to endow one or more branches of the Executive Department—and notably the Commissioner of Corporations and the Interstate Commerce Commission—with dispensing powers of various sorts.

### 3. The Purpose to Establish Bureaucratic Government in this Country.

3. The third political error which has forcibly come to view in the consideration of the radical policy of railroad regulation, as hereinbefore described, is the evident purpose to establish in this country the bureaucratic method of administration in the conduct of our governmental affairs. This is now clearly apprehended by American statesmen.

The bureaucratic method of government was a potential cause of the downfall of the Roman Empire. In all ages it has been a hated form of tyranny. It prevails in Russia under conditions hostile to constitutional government. It is utterly incompatible with the political institutions of the English speaking people of the globe. And yet it finds clear expression in the so-called "Civic Federation Bill," which proposes to confer upon the Commissioner of Corporations and the Interstate Commerce Commission bureaucratic powers.

In the course of the hearings before the Senate Committee on the Judiciary an advocate of Senate Bill 6440 was describing the provisions of that bill when Senator Nelson, chairman, propounded to him the question, "Is NOT THAT CREATING BUREAUCRATIC GOVERNMENT?" By way of illustration the Senator pointed to the fact that in a given case he could go to the courts in his own State and there get relief, whereas under the provisions of this bill he would be obliged to go to Washington and there seek relief from an

administrative officer of the Government. In reply the advocate of Senate Bill 6440 admitted that such might possibly be a result of the bill which he and the Civic Federation were advocating. But that would evidently be revolutionary.

In the opinion of able constitutional lawyers and statesmen, a law involving the principles of bureaucratic government would be declared to be invalid by the Supreme Court of the United States as being opposed to the genius of our political institutions.

4. A Proposition in the Nature of Espionage.

4. The employment of an army of inspectors to supervise and control the accounts of railroad companies appears to be in the nature of espionage. That is a feature of the proposed radical policy of railroad regulation.

T. E. May, in his Constitutional History of England, volume 2, chapter 11, page 275, says:

> "Nothing is more revolting to Englishmen than espionage which forms part of the administrative systems of continental despotism. * * * The freedom of a country may be measured by its immunity from this baleful agency. Rulers who distrust their own people must govern in the spirit of absolutism—and suspected subjects will be ever sensible of their bondage."

While uniformity of accounting appears to be desirable it should be brought about by means less autocratic.

5. The assumed right of the Commissioner of Corporations of his own motion to "enter an order declaring that *in his judgment*" a contract or combination is in reasonable or in unreasonable restraint of trade or commerce is a feature of the radical regulation of railroads and of other corporations or associations which is highly objectionable. It has the appearance of a judicial finding by an officer who has no judicial authority whatsoever.

## Disastrous Results of the Radical Policy of Railroad Regulation.

The destructive effects of the radical policy of railroad regulation were strikingly exhibited as the result of the passage of the act of June 29, 1906, commonly known as "The Rate Bill." During the winter of 1906-'7 there was a shrinkage of corporate securities in the money markets of the United States amounting to about five thousand million dollars. This exceeded the cost of the civil war. The inevitable result of this shrinkage in values was the financial crisis of October, 1907, from the effects of which the country has not yet recovered. The subsequent decline in the trade and industries of the country has resulted in an astounding falling off in the traffic by rail. During the last six months about one-fourth of the freight car capacity of the country has been unemployed, and receipts from freight traffic have been dangerously reduced. Besides over two million laborers in all avocations have been thrown out of employment.

Radical railroad legislation and administration has eventuated in the final elimination of the American Merchant Marine from participation in the foreign commerce of the Pacific Ocean.

All this was foreseen and predicted by U. S. Senator Joseph B. Foraker, of Ohio, who, from the beginning, has been a vigorous opponent of the radical policy of railroad regulation.

It will be a misfortune to the whole country when a body of railroad presidents, who have devoted their lives to the study of the economic questions involved in the business of transportation, and are met together to confer as to the best expedient to be adopted in order to avert disaster as the result of an insufficiency of net income to preserve from insolvency the credit of the properties which they administer shall be confronted by the anti-trust law in proof that they have been guilty of a conspiracy in restraint of trade or be

subjected to the discretion of a tribunal of governmental administrative officers guided mainly by a hostile public sentiment in regard to their treatment of the railroads.

## The Anti-trust Act of July 2, 1890.

The problem, how to regulate the railroads of this country, has been seriously compromised by the attempt to suppress monopolies and trusts in restraint of trade or commerce. After much discussion of this difficult question Congress passed the so-called anti-trust act of July 2, 1890, entitled "an act to protect trade and commerce against unlawful restraints and monopolies." This act proved to be a legislative misadventure in a double sense. It failed to reach the particular class of monopolies for the suppression of which it was intended and it reversed a beneficent rule of public policy which for centuries had been recognized as a feature of the common law, a result which was not intended by the legislature. It also abolished a principle of regulation of the railroads which had been established by the railroad companies of the country through the rough experiences of twenty years of competitive struggle.

## Explanation of Senate Bill 6440, by Hon. Herbert Knox Smith, Commissioner of Corporations.

On May 8, 1908, Honorable Herbert Knox Smith, Commissioner of Corporations, submitted to the Senate Committee on Corporations a statement explanatory of the provisions of Senate Bill 6440—the so-called Civic Federation Bill. His statement which may be found on page 131 of the hearings before the Senate Committee on the judiciary is frank and intelligible; and yet at certain important points it is illogical and misleading. Commissioner Smith stated clearly the distinction between reasonable and unreasonable restraints of trade at common law. He also stated correctly

the change made in the common law by the Sherman Act of July 2, 1890. Upon this point he said:

> "Prior to the law it was left to the courts to determine what amount or nature of such restraint rendered the contract contrary to public policy, in other words, unreasonable and therefore unenforcible. The common-law validity of the contract was based wholly upon public policy."

Commissioner Smith next stated correctly that the Sherman law introduced a new rule of public policy, namely, that all restraints of trade, whether reasonable or unreasonable, are against public policy. The Supreme Court of the United States justified its conclusion on this point in the following words:

> "When the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

Then by a long wild leap of fancy, unsupported by facts, Commissioner Smith jumped to the conclusion that a new rule of public policy is needed namely "that while the prohibition of certain forms of combination is still necessary, there is far greater necessity for effective administrative regulation of combinations." This is a mere theoretical assumption which Senate Bill 6440 is intended to incorporate into law. Upon this point Commissioner Smith simply quoted an opinion expressed by President Roosevelt in his special message to Congress on January 31, 1908. Mr. Smith also declared that it constitutes a "decided trend of public opinion." That is yet to be determined as the result of Congressional inquiry, which may and probably will find the trend of public opinion to be in the opposite direction. This appears probable from the fact that both branches of Congress refused to legislate in the manner in which the President urgently entreated them to legislate,

but deferred the whole matter to the next session of Congress which will assemble on December 7, 1908.

The bill, the passage of which Mr. Smith advocates, provides that the Commissioner of Corporations and the Interstate Commerce Commission shall be invested with the power to decide in all the important cases to which it may apply as to which rule of public policy the judgment of the Federal courts shall conform. This was appalling, both to the Senate and the House of Representatives. Upon this point the Commissioner of Corporations said:

> "The bill provides that registered corporations shall not be prosecuted under the Sherman Act for existing and past combinations which are reasonable, and furthermore the bill provides a short period of limitations for all prosecutions under the Sherman law, to wit, one year after the passage of this act."

The fact in regard to the change in the rule of public policy effected by the decision of the Supreme Court in the Trans-Missouri Case, 166 U. S., 312, is that that decision was the inevitable result of a legislative misadventure. This was clearly stated by Senator Hoar, chairman of Senate Committee on the Judiciary, in a speech in the Senate on January 6, 1903, as follows:

> "We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade. It was believed that the phrase 'in restraint of trade' had a technical and well-understood meaning in the law. It was not thought that it included every restraint of trade whether healthy or injurious.
>
> "We were disappointed in one particular. The court, by one majority, and against the very earnest and emphatic dissent of some of its great lawyers, declined to give a technical meaning to the phrase 'in restraint of trade,' and held, in one important case, that if trade were restrained by an agreement it was no matter whether it were injuriously restrained or no."

In order to cure the effects of this legislative misadventure Senator Foraker has introduced a bill—S. 6331—which provides that nothing in the act of July 2, or the acts amendatory or supplementary thereto, "shall hereafter be construed or held to prohibit any contract, agreement, or combination that is not in unreasonable restraint of trade or commerce with foreign nations or among the several States."

The adoption of this amendment would restore the rule of the common law in regard to the distinction between reasonable and unreasonable restraints of trade. This is evident from the following statements, showing that upon this point the entire court agreed:

Mr. Justice Peckham, delivering the opinion of the court in the Trans-Missouri case, said:

> "Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature."

And Mr. Justice White, who delivered the opinion in which the four dissenting justices concurred, said:

> "It is unnecessary to refer to the authorities showing that although a contract may in some measure restrain trade, it is not for that reason void, or even voidable, unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine."

The rule of public policy which discriminates between reasonable and unreasonable restraints of trade was, as stated by Mr. Justice Peckham, the rule of public policy of the English-speaking people of the globe "for hundreds of

years." In the sacred cause of liberty and justice, it is earnestly to be hoped that by the adoption of Senator Foraker's bill the rule which discriminates between reasonable and unreasonable restraints may become the rule of public policy in this country for hundreds of years to come. The adoption of this bill would vindicate the principle that this is a government by law, whereas the adoption of the bill recommended by Commissioner Smith would lead to the heresy that ours is a government controlled by the discretion and individual judgment of bureau officers of the executive branch of the Government.

Besides, the whole bill is subject to the objection that it provides for an unwarranted assumption of judicial authority by the Commissioner of Corporations and the Interstate Commerce Commission.

## Conclusion.

I am convinced that the future welfare and prosperity of the railroads of this country largely depends upon a proper determination of the question as to the nature and extent of the governmental regulations which shall be imposed upon the railroads, having special reference to the question as to the administrative supervision and control which shall be exercised over their physical properties and their financial interests. This question in its various aspects was raised in the discussion of the so-called Civic Federation Bill, action upon which was postponed until the next session of Congress, which assembles on December 7, 1908, and adjourns without day on March 4, 1909. Owing to the shortness of the next session of Congress and the magnitude and complexity of the subject to be considered it appears probable that it will go over to the Sixty-first Congress for final action.

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